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No. 10-963

Supreme Court, U.S.
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In The Supreme Court of the United States

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation,

Petitioner,

vs.

ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; GIANT ELECTRIC CORPORATION, an Arizona corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

REPLY BRIEF FOR THE PETITIONER

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LEGAL ARGUMENT

Pursuant to U.S. SUP. CT. RULE 15.6, Petitioner, Progressive Casualty Insurance Company ("Progressive"), hereby files this Reply addressing new points raised in the Respondent Estate of Palomera-Ruiz's ("Estate") Response in Opposition to the Petition for Certiorari.[1] The Court should reject the Estate's purported distinction between an "offer" and a "record" because the argument has been waived, and in any event, it is inconsistent with E-SIGN. The Estate's position merely highlights Progressive's point that the dispute over the validity of electronic recordings of oral communications under E-SIGN and UETA is an important federal question and a matter of nationwide importance. The Court should grant certiorari to issue valuable guidance on the proper interpretation of E-SIGN's and UETA's consent provisions.[2]

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[1] The Estate correctly identifies an error in Progressive's Petition, that the at-fault motorist in the subject accident was uninsured rather than underinsured, but this does not make any difference in the analysis of E-SIGN or UETA, and the Estate does not argue otherwise.

[2] The final argument in the Estate's Response is that the opinion of the Arizona Court of Appeals in this case does not conflict with the New Mexico Supreme Court's decision in *Jordan v. Allstate Ins. Co.*, 245 P.3d 1214, 2010-NMSC-051, Oct. 18, 2010, *reh'g denied*, Dec. 3, 2010. Because Progressive fully addressed *Jordan* in Section III of its Petition, and because it provided additional nationwide authorities in Section IV of its Petition, those arguments are not repeated here.

I. The Estate's Purported Distinction Between an "Offer" and a "Record" Is Inconsistent With E-SIGN Because It Denies Legal Effect to Recorded Phone Calls.

The Estate contends that E-SIGN is inapplicable to this situation because of the alleged "distinction between an offer and the record of an offer." (Estate's Resp. Br. at 10). The Estate failed to raise this argument in the trial court, and none of the courts below have considered it or relied on it. Consequently, the Estate has waived this argument. *See* 2A FED. PROC., L. ED. § 3:856 ("The Supreme Court will generally not reach an issue which is not raised, considered, or resolved in the court below, but is raised for the first time on appeal.") (citing *Glover v. U.S.*, 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992); *Air Courier Conference of America v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); *International Broth. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 107 S. Ct. 2161, 95 L. Ed. 2d 791 (1987); *City of Lockhart v. U.S.*, 460

U.S. 125, 103 S. Ct. 998, 74 L. Ed. 2d 863 (1983); *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981); *Tacon v. Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973)).

The Estate's construction of its alleged distinction between an "offer" and a "record" demonstrates the semantical lengths and theoretical hairs that must be split in order for the Estate to rationalize its position with E-SIGN. Specifically, the Estate contends that "the electronic *record* of Progressive's transaction was not denied validity or effect; the format of its record-keeping was irrelevant to the disposition of the case. . . . Progressive's fault lies not in the record but in the offer." (Estate's Resp. Br. at 10-11; emphasis in original). The Estate's misguided distinction between an "offer" and a "record" might be more persuasive if both the "offer" and "written notice" elements of Ariz. Rev. Stat. § 20-259.01 were under dispute in the present appeal. That is not the case. Progressive undisputedly made the "offer" of higher UM/UIM limits to Giant Electric. The issue here is whether the recorded phone call qualifies as "written notice" under E-SIGN, UETA, and AETA. The Estate concedes an electronic "record" can be kept after the offer, but elevates a prior "written" offer to some other standard. That is form over substance. Therefore, this Court should reject the Estate's purported distinction between an "offer" and a "record."

Similarly, the Estate further hypothesizes that an offer of UM/UIM coverage conveyed through visual technologies like fax or e-mail would qualify under

Arizona's UM/UIM statute, but a phone call does not qualify. The Estate wants to mandate a visual, readable format for the offer over all other technological methods. This elevation of visual technologies over non-visual ones is contrary to E-SIGN's requirement of technology-neutrality. What the Estate is really arguing is that no oral contract or record should be given legal effect under E-SIGN. What does this mean if a consumer is blind? Are we limited in the technological assistance that can be used? The Estate's attempt to limit the ways to comply with the statute for its benefit despite an acknowledged agreement to the contrary as to the UM/UIM limits highlights Progressive's point that the dispute over the validity of electronic recordings of oral communications under E-SIGN and UETA is an important federal question and a matter of nationwide importance. (*See* Progressive's Petition at 21-27).

Accordingly, the Court should grant the Petition for Certiorari.

II. The Interpretation of E-SIGN's and UETA's Consent Provisions Is an Important Federal Question.

This Court should reject the Estate's argument that Progressive failed to comply with E-SIGN's consent requirements. Instead, the Court should grant certiorari to clarify the proper interpretation of E-SIGN's and UETA's consent provisions. The Estate's limited notion of consent is incompatible with

the applicable statutes. To require an agreement in paper form, or even to require any explicit agreement at all, would defeat the purposes of E-SIGN and UETA. Commentators have explained that "[t]he mere fact of use, or of behavior consistent with acceptance, by a party should be sufficient to evidence that party's willingness and to make applicable E-SIGN's base rule." Robert A. Wittie & Jane K Winn, *Electronic Records And Signatures Under The Federal E-Sign Legislation And The UETA*, 56 BUS. LAW. 293, 299-300 (2000) (noting that "E-SIGN's rule is negative, providing only that parties are not required to use or accept them."). Here, Progressive manifested its assent to do business electronically by advertising its 800 number. Giant Electric manifested its assent by calling the 800 number, agreeing to procure a policy, selecting UM/UIM coverage orally over the phone, and by providing identifying information, including the company president's name, title, driver's license number, bank account number, routing number, and a check number. [*See* App. at 86, 90, 99-101, 103-04, 116-17].

Moreover, Giant Electric's consent was unnecessary, because E-SIGN clearly states that compliance with its consent requirement, 15 U.S.C. § 7001(c)(1), is not required in the case of a phone call:

> (6) Oral communications
>
> An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this

> subsection [15 U.S.C. § 7001(c)] except as otherwise provided under applicable law.

15 U.S.C. § 7001(c)(6). Therefore, pursuant to § 7001(c)(6), the consent requirement of § 7001(c)(1) does not apply to oral communications, including the recorded phone conversation in this case. In addition, the explicit exemption of recorded phone calls from E-SIGN's consent requirements further demonstrates that recorded phone calls *do* qualify as electronic records under the remainder of the statute. Certainly if oral communications and recordings of oral communications were not electronic records, then Congress would have no need to exclude them in subsection (c)(6).

The plain language of subsection (c)(6) makes the Estate's speculation about Congressional intent unnecessary. But even if the Court inquires about Congressional intent, the Estate's discussion of the alleged policy relating to oral communications is contrary to E-SIGN's purpose and makes no practical sense. Instead, it is reasonable to conclude that the reason Congress exempted oral communications from the consent requirements of 15 U.S.C. § 7001(c)(1) was because those requirements are unwieldy in the case of phone calls. Under the Estate's view, where, as here, a new customer initiates contact over the phone, the parties would be required to: (1) end their phone conversation immediately; (2) the insurer must send a letter requesting the customer's consent to do business electronically; (3) the insured must send the

letter back, indicating that he or she agrees to do business electronically; and finally, (4) the parties may resume their phone conversation. Such an approach is obviously time-consuming and not required by the statutory language. The Estate's approach would essentially undermine E-SIGN and result in hindrance of all electronic transactions and a return to paper transactions. This is not what Congress intended. Consequently, Giant Electric's conduct of willfully calling Progressive's 800 number and providing the information during the phone call was a sufficient manifestation of its consent to an electronic transaction and an electronic record.

The Estate's argument relating to consent is also flawed because 15 U.S.C. § 7001(c) applies only to "consumer disclosures." A consumer disclosure is information about a transaction that is required by statute to be disclosed to a consumer; for example, disclosures required by the Truth-in-Lending Act. Ethna M.S. Piazza, *Common Misconceptions Surround Electronic Transactions With Consumers*, 19 No. 5 INTELL. PROP. & TECH. L.J. 15, 15 (May 2007); *see also In re Padgett*, 408 B.R. 374, 388 (B.A.P. 10th Cir. 2009) (citing *In re Munzberg*, 388 B.R. 529, 543 (Bankr. D. Vt. 2008) (stating that Federal Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.*, is a consumer disclosure statute)). Other examples of consumer disclosures are: (1) the consumer reporting agency's file that is revealed to the consumer as contemplated

by 15 U.S.C. § 1681g, *Johnson v. Equifax, Inc.*, 510 F. Supp. 2d 638, 645 (S.D. Ala. 2007), and (2) Rule 10b-16 of the Securities Exchange Act of 1934 requiring the disclosure of, among other things, the annual rate of interest, *Baden v. Craig-Hallum, Inc.*, 646 F. Supp. 483, 488 (D. Minn. 1986) (Rule 10b-16 is a consumer disclosure provision to protect investors). 15 U.S.C. § 7001(c) is inapplicable because Arizona's UM/UIM statute, Ariz. Rev. Stat. § 20-259.01, is not a disclosure statute. It merely requires that an offer of UM/UIM coverage be made. *State Farm v. Ash*, 181 Ariz. 167, 173, 888 P.2d 1354, 1360 (App. 1994) ("The insurer need only make the written offer.").

Similar to E-SIGN, AETA's consent requirement provides:

> This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is *determined from the context and surrounding circumstances, including the parties' conduct.*

Ariz. Rev. Stat. § 44-7005(B) (emphasis added). The drafters of UETA explained that "it is essential that the parties' actions and words be broadly construed in determining whether the requisite agreement exists." UETA § 5, Comment 4. Once the intent to conduct a transaction electronically is established, UETA applies. *Id.* UETA does not require consent to be

explicit or in a visual format. UETA Prefatory Note (A) states:

> [T]he construction of the term agreement must be broad in order to assure that the Act applies whenever the circumstances show the parties intention to transact electronically, *regardless of whether the intent rises to the level of a formal agreement.*

UETA Prefatory Note (A). Consequently, Giant Electric's conduct of willfully calling Progressive's 800 number and providing information during the phone call was a sufficient manifestation of its consent to an electronic transaction and an electronic record.

This Court should grant certiorari in order to clarify that a party may implicitly consent to do business electronically under E-SIGN and UETA, through behavior consistent with acceptance. In addition, the Court should clarify that, pursuant to 15 U.S.C. § 7001(c)(6), the consent requirements contained in 15 U.S.C. § 7001(c)(1) do not apply to oral communications.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. Alternatively,

the Court should grant certiorari and summarily reverse.

Respectfully submitted,

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